Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

# In the Supreme Court of the United States

FOREST OIL CORPORATION,
*Petitioner*,

v.

GULF CREWS INC., GULF BOAT MARINE SERVICES INC., AND SECURITY INSURANCE COMOPANY OF HARTFORD,
*Respondents*.

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

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67 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Whether an action brought pursuant to 33 U.S.C. § 905(b) arises under the general maritime law or is a new claim created by the 1972 Amendments to the Longshore & Harbor Workers' Compensation Act?

2. Whether a claim brought pursuant to 33 U.S.C. § 905(b) can be cognizable if admiralty jurisdiction is not present?

## LIST OF PARTIES

Petitioner is Forest Oil Corporation, a corporation created under the laws of New York with its principal place of business in Colorado. Petitioner is unaware of any publicly held company owning ten (10%) percent or more of Forest Oil Corporation's stock.

Respondents are Gulf Crews Inc., Defendant-Cross Defendant-Appellee, Gulf Boat Marine Services Inc., Defendant-Cross Defendant-Appellee, and Security Insurance Company of Hartford, Third Party Defendant-Appellee.

Additional parties to this case below were Peter J. Dahlen, Plaintiff, and Universal Ogden Services.

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## OPINIONS AND JUDGMENTS BELOW

The decision of the Court of Appeals, Fifth Circuit is reported at 281 F.3d 487 (5th Cir. 2002).[1]

The decision of the United States District Court for the Western District of Louisiana in *Dahlen v. Gulf Crews*, Civil Action No. CV96-1300-LC, is not reported.[2]

## STATEMENT OF JURISDICTION

The Clerk of Court for the United States Court of Appeals for the Fifth Circuit entered the judgment sought to be reviewed on February 4, 2002. The Fifth Circuit denied rehearing and rehearing en banc in an order dated June 13, 2002.[3] No motions for extension of time have been filed.

Because this petition is filed within ninety days of the United States Fifth Circuit Court of Appeal's denial of rehearing, this Honorable Court has jurisdiction of this petition by virtue of 28 U.S.C. § 1254(1). Jurisdiction in the courts below was premised on federal admiralty jurisdiction, 28 U.S.C. § 1333, federal question jurisdiction, 28 U.S.C. § 1331, and the Outer Continental Shelf Lands Act, 43 U.S.C. § § 1333(a)(1) and 1349(b). Federal appellate jurisdiction was based on 28 U.S.C. § 1291.

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[1] App. 4a.

[2] App. 31a.

[3] App. 1a

## APPLICABLE LAWS INVOLVED

This case involves the following statutory provisions:

A. The Longshore & Harbor Workers' Compensation Act, ("LHWCA"), 33 U.S.C. § 905(b).

B. The Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* ("OCSLA").

33 U.S.C. § 905(b), provides, in pertinent part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.

## STATEMENT OF THE CASE

### I. Course of Proceedings and Disposition in Court Below

#### A. Plaintiff's Claims Against Forest

Plaintiff, Peter Dahlen, filed suit against Forest Oil Corporation ("Forest") and other parties, in May 1996 for personal injuries sustained on a platform owned and operated

by Forest in Federal waters on the Outer Continental Shelf. Suit was originally filed in state court in Cameron Parish, Louisiana, but was timely removed by all Defendants to the United States District Court for the Western District of Louisiana.[4] Dahlen claimed that he was injured on Forest's platform located on the Outer Continental Shelf as a result of unloading groceries.[5]

Forest moved for summary judgment in April 1997, on the ground that it was Dahlen's borrowing employer and therefore immune from tort liability pursuant to OCSLA, 43 U.S.C. § 1333(a)(ii)(A), which makes applicable the LHWCA, 33 U.S.C. § 901 *et seq.*[6] The District Court granted the Motion for Summary Judgment holding that Forest was Dahlen's borrowing employer under the LHWCA, and therefore, Forest was immune from any tort liability to Dahlen.[7] However, the District Court further held that Dahlen could maintain a negligence claim under 33 U.S.C. § 905(b) against Forest, grounded on admiralty subject matter jurisdiction, in its capacity as the time charterer of the M/V BILLY JAY,[8] pursuant to the Admiralty Extension Act, 46

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[4] R. Vol. 1, p. 8.

[5] R. Vol. 1, p. 3

[6] R. Vol. 2, p. 185.

[7] R. Vol. 3, p. 431.

[8] Forest time chartered the M/V BILLY JAY from Gulf Crews Inc. and/or Gulf Boat Marine Services Inc. For simplicity, Gulf Crews Inc. and Gulf Boat Marine Services Inc. will be referred to as "Gulf."

U.S.C § 740.[9] Under *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), Forest was still potentially liable in its capacity as a "vessel owner" pursuant to 33 U.S.C. §905(b).

Forest filed a Motion for Summary Judgment contending there was no admiralty jurisdiction, which was denied by the District Court.[10] Dahlen's § 905(b) claim against Forest was tried to a jury commencing on July 30, 2000. The jury returned a verdict finding that Forest was not at fault as time charterer of the vessel, and judgment was entered accordingly, in favor of Forest, dismissing all of Plaintiff's claims against Forest with prejudice.[11] Plaintiff, Peter Dahlen appealed this judgment, and the Fifth Circuit affirmed the judgment and rehearing was denied.

Forest appealed the District Court's finding that there was admiralty jurisdiction pursuant to the Admiralty Extension Act. [12] The Fifth Circuit reversed the District

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[9] R. Vol. 3, p. 431.

[10] R. Vol. 9, p. 1421; R. Vol. 9, p. 1527 (denial).

[11] R. Vol. 11, p. 1820 (jury verdict) (Forest Record Excerpts No. 2); R. Vol. 10, p. 1796 (judgment) (Forest Record Excerpts No. 3).

[12] The Admiralty Extension Act, 46 U.S.C. §740, provides in part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

Court finding the Admiralty Extension Act inapplicable, thus agreeing with Forest that there was no admiralty jurisdiction.

### B. Forest's Claims Against the Vessel Owner

Forest filed a cross-claim against Gulf, the owner of the vessel that delivered the groceries to Forest's platform, for indemnity pursuant to a blanket time charter agreement ("Charter").[13] Forest also filed a third-party claim against Security, Gulf's protection and indemnity insurer, as an additional assured, for insurance coverage on Dahlen's claim.[14] After trial, the District Court denied Forest's claim for indemnity against Gulf, and dismissed the cross-claim, and further denied Forest's claim for insurance coverage against Security and dismissed the third-party complaint.[15] Forest appealed those decisions.[16] The Fifth Circuit affirmed the District Court's denial of Forest's claims for indemnity and insurance against Gulf and Security.

The only claim at issue in this Petition is Forest's claim against Security for insurance coverage. The Fifth Circuit found that there was no insurance coverage provided to Forest because Dahlen's claims were "under the LHWCA,"[17] and there was a policy exclusion applicable for claims that arise pursuant to a "compensation act." The Fifth

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[13] R. Vol. 3, p. 420.

[14] R. Vol. 4, p. 584.

[15] R. Vol. 11, p. 1909 (Forest Record Excerpts No. 4).

[16] R. Vol. 11, p. 1910 (Forest Record Excerpts No. 1).

[17] App. 27a

Circuit's holding that Dahlen's § 905(b) claim arose under a compensation act despite the court's finding of no admiralty jurisdiction leads to the conclusion that the § 905(b) claim was a new claim and not a preservation of a previously existing claim under maritime law. Forest submits that the decision that Dahlen's claim arose under the LHWCA conflicts with earlier precedent of this Court, and with decisions of other Circuits, which have found that the §905(b) claim is not a new claim, but simply a preservation of an existing general maritime tort claim.

## II. Statement of Facts

Plaintiff, Peter Dahlen, was a contract operator on the Forest platform and nominally employed by Island Operating, Inc.[18] Dahlen was allegedly injured due to overexertion from moving groceries from a large metal container, commonly referred to as a grocery box, on the platform. The grocery box was delivered by the M/V BILLY JAY, a vessel owned by Gulf and time chartered to Forest, and unloaded from the vessel to the platform by Dahlen with the platform crane.[19] Once Dahlen unloaded the grocery box, the box was backloaded onto the M/V BILLY JAY to continue its voyage to other platforms, so that the other platforms could receive their designated groceries.

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[18] R. Vol. 12, p. 78, l. 5-8. The District Court subsequently found Dahlen to be a "borrowed employee" of Forest, and that finding has not been appealed.

[19] R. Vol. 12, p. 85, l. 11-p. 86, l. 6.

## REASONS FOR GRANTING THE WRIT

### I.

### The Decision of the Fifth Circuit Holding that A Tort Claim Brought Pursuant to 33 U.S.C § 905(b) Arises Under the LHWCA Conflicts with A Prior Supreme Court Ruling and Other Circuits Rulings.

Forest was sued under 33 U.S.C. § 905(b) of the LHWCA in its capacity as time charterer of the M/V BILLY JAY. Contrary to the Fifth Circuit's decision, Dahlen's § 905(b) claim was not a claim against Forest "under the LHWCA" or any other "Compensation Act." The Fifth Circuit's conclusion that Forest was sued under the LHWCA despite a finding of no admiralty jurisdiction calls into question precedent defining the character and scope of a claim against a vessel pursuant to § 905(b), and potentially has far reaching effects on maritime law.

Beginning with the Supreme Court decision of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872 (1946), longshoreman such as Dahlen were afforded a cause of action against the vessel for unseaworthiness if injured while loading or unloading a vessel. In 1972 Congress amended the LHWCA, to, *inter alia*, curtail the *Sieracki* claim. Section 905(b) of the LHWCA, the section upon which Dahlen relied in the instant case, retained the longshoreman's action against his employer who is also a vessel. However, the standard for such a claim was no longer unseaworthiness, but "vessel negligence." The § 905(b) claim is not a new claim given by the LHWCA, but a codification of the prior *Sieracki* maritime claim with a change in the standard of liability.

In *Parker v. South Louisiana Contractors, Inc.*, 537 F.2d 113, 117 (5th Cir. 1976), the court found that the 1972 Amendments, § 905(b) in particular, **were a preservation of previous rights**, not the creation of new rights. Once again, in *Russell v. Atlantic & Gulf Stevedores*, 625 F.2d 71, 72 (5th Cir. 1980), the issue of whether an action under § 905(b) arose under the LHWCA was decided. The court held that § 905(b) did not create a new negligence cause of action, but preserved an injured worker's right to recover damages from third parties in accordance with non-statutory negligence principles. *Id.* at 72.

The *en banc* decision of *Richendollar v. Diamond M. Drilling Co.*, 819 F.2d 124, 127-28 (5th Cir.), *cert. denied*, 484 U.S. 944, 108 S.Ct. 331, 98 L.Ed.2d 358 (1987), also addressed the issue as to the origin of the § 905(b) claim. The court stated: "We reiterate today that when [Congress] enacted § 905(b), Congress **did not create a new or broader cause of action** . . . ." *Id.* at 127-28.

It is clear that a § 905(b) claim does not arise under the LHWCA, but is a separate maritime tort. The Fifth Circuit's conclusion in this case that a § 905(b) claim arises under the LHWCA moves that claim from one in "admiralty" to the "law" side of the federal court, thereby changing many of the procedural attributes reserved for admiralty claims under § 905(b).[20] The need for uniformity in all maritime

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[20] The legal effect of stating that a § 905(b) claim arises under the LHWCA will serve to undermine the rulings in *Parker* and *Russell*, and other cases relying upon the maritime nature of the § 905(b) claim. In the context of *Parker*, a finding that a § 905(b) claim arises under the LHWCA opens the possibility of a § 905(b) claim being brought in federal court pursuant to 28 U.S.C. § 1337. In the context of *Russell*, such a decision opens the possibility of a

cases, including those brought pursuant to § 905(b), requires consideration by this Court.

The Fifth Circuit's decision conflicts with the prior Supreme Court opinion of *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), as well as decisions of other circuits holding that the 1972 Amendments did not create a new cause of action, but retained the general maritime tort action. See, *e.g., Holland v. Sea-Land Service*, 655 F.2d 556 (4th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir. 1984); and *Drake v. Raymark Industries*, 772 F.2d 1007 (1st Cir. 1985), *cert. denied sub nom. Raymond Industries Inc. v. Bath Iron Works, Inc.*, 476 U.S. 1126 (1986).

In *Jones & Laughlin Steel Corp.*, this Court was faced with the issue of whether a longshoreman could bring an action against his employer, when his employer was a "vessel" under 33 U.S.C. § 905(b). In discussing the language of § 905(b), the Court recognized that prior to the 1972 Amendments, the LHWCA allowed a longshoreman to recover against his employer under a general maritime tort theory of "unseaworthiness." *Jones*, 462 U.S. at 531, 103 S.Ct. at 2547-2548. The Court also made it clear that Congress, with the 1972 Amendments to the LHWCA, did not create a new cause of action under § 905(b). Instead, the Court found that "Congress clearly intended to **preserve** the rights of longshoreman employed by a vessel to maintain such an action." *Id.* (Emphasis added.) The decision of the Fifth Circuit that the Plaintiff's claim arises under the LHWCA, and thus arises under a compensation act, is clearly in conflict

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jury being demanded in a § 905(b) claim.

with *Jones*, wherein this Court decided that the § 905(b) claim was a preservation of pre-existing general maritime tort rights and not the creation of a new cause of action under the LHWCA.

The Fifth Circuit's decision also conflicts with decisions of other Circuits. In *Drake*, the First Circuit held that a § 905(b) action was a maritime tort, and required maritime jurisdiction to support such a claim. *Drake, supra*, 772 F.2d at 1012, 1014. The First Circuit noted that the § 905(b) claim was not a new claim, but a preservation of the previously existing maritime claim, which was only cognizable when maritime jurisdiction was present. Also, in *Harville*, the Eleventh Circuit opined that Congress in the 1972 Amendments did not create a new cause of action, but merely preserved preexisting remedies. *Harville, supra*, 731 F.2d at 787 n.9. The Fourth Circuit has also held that § 905(b) was a preservation of preexisting general maritime rights. See *Holland, supra*, 655 F.2d at 559.

## II.

### There Can Be No Cause of Action Pursuant to 33 U.S.C. § 905(b) If Admiralty Jurisdiction Is Not Present.

The jurisprudence is uniform in holding that in order for a claim to be cognizable under § 905(b), admiralty jurisdiction must be present. See *Richendollar v. Diamond M. Drilling Co.*, 819 F.2d 124, 127-28 (5th Cir.), *cert. denied*, 484 U.S. 944, 108 S.Ct. 331 (1987). The Fifth Circuit held that there was no admiralty jurisdiction present in this case, as the Admiralty Extension Act did not apply. However, inconsistently, the Fifth Circuit also held that the Plaintiff's claim arose under § 905(b), which requires

admiralty jurisdiction.

By allowing a § 905(b) claim to act as a bar to insurance coverage in this case, despite an absence of admiralty jurisdiction, the Fifth Circuit has called into doubt years of jurisprudence. The logical extension of the Fifth Circuit's rulings in this case is to allow a § 905(b) action, despite a lack of admiralty jurisdiction. This is contrary to existing law, and also contrary to Congress' intent expressed in the 1972 Amendments to the LHWCA, which were to retain the *Siercaki* claim, but not to create a new or broader cause of action.

The Fifth Circuit ruling also conflicts with similar decisions of other Circuits on this subject. See *Holland v. Sea-Land Service*, 655 F.2d 556 (4th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir. 1984); and *Drake v. Raymark Industries*, 772 F.2d 1007 (1st Cir. 1985), *cert. denied sub nom. Raymond Industries Inc. v. Bath Iron Works, Inc.*, 476 U.S. 1126 (1986).

## III.

## The Question Presented Is Important

The determination of the origin of a § 905(b) claim is very important to maritime law. If the origin of the § 905(b) claim is not from the *Sieracki* claim, then it is a federal statutory cause of action, with arguably federal question jurisdiction and corresponding "at law" features. This is not the accepted view, with most courts agreeing that a § 905(b) claim is on the "admiralty" side of the court. See *Holland v. Sea-Land Service*, 655 F.2d 556 (4th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982); *Harville v. Johns-Manville Products*

*Corp.*, 731 F.2d 775 (11th Cir. 1984); and *Drake v. Raymark Industries*, 772 F.2d 1007 (1st Cir. 1985), *cert. denied sub nom. Raymond Industries Inc. v. Bath Iron Works, Inc.*, 476 U.S. 1126 (1986).

One impact of the Fifth Circuit's ruling is on removal jurisdiction. Under the reasoning of the Fifth Circuit in this case, a § 905(b) claim is removable, as it arises under the statutory grant of the LHWCA. This would conflict with the established rule that only § 905(b) claims with an independent basis for jurisdiction may be removed to federal court because maritime claims do not "arise under" federal law. See *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 377-79, 79 S.Ct. 468, 483 (1959).

Another impact is on the issue of that availability of a jury. In a maritime cause of action, there is generally no jury available unless there is also an independent basis for jurisdiction. See Fed. R. Civ. Proc. 9(h); *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978); *Powell v. Offshore Navigation, Inc.*, 644 F.2d 1063 (5th Cir.), *cert. denied*, 454 U.S. 972, 102 S.Ct. 521 (1981). However, if a § 905(b) claim arises under the LHWCA, then there would be an independent basis for jurisdiction, and there should be a choice of a jury. *Id.*

## CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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## APPENDIX A

## IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**[Filed June 13, 2002]**

**Case No. 00-31119**

PETER J. DAHLEN, ET AL.,
*Plaintiffs*
PETER J. DAHLEN
*Plaintiff- Appellant-Cross Appellee*
v.

GULF CREWS, INC., GULF BOAT MARINE SERVICES, INC.,
*Defendants- Cross Defendants-Appellees,*
UNIVERSAL OGDEN SERVICES,
*Defendant- Appellee,*
FOREST OIL CORP.,
*Defendant-Cross Claimant-Third Party Plaintiff- Appellee-Cross-Appellant,*
v.

SECURITY INSURANCE CO. OF HARTFORD
*Third Party Defendant-Appellee*

Appeals from the United States District Court
for the Western District of Louisiana, Lake Charles

**ON PETITIONS FOR REHEARING AND REHEARING EN BANC**

(Opinion 02/04/02, 5 Cir., ____, _____ F.3d _____)

Before JONES and DeMOSS, Circuit Judges, and LIMBAUGH,* District Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) The Petitions for Rehearing are DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active services not having voted in favor, (Fed. R. App. P. and 5th Cir. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) A member of the court in active service having requested a poll on the reconsiderations of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearings En Banc are DENIED.

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* District Judge of the Eastern District of Missouri sitting by designation.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

Judge E. Grady Jolly did not participate in the consideration of the rehearing en banc.

## APPENDIX B

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

**[Decided February 4, 2002]**

**Case No. 00-31119**

PETER J. DAHLEN, ET AL.,
*Plaintiffs*
PETER J. DAHLEN
*Plaintiff- Appellant-Cross Appellee*
v.

GULF CREWS, INC., GULF BOAT MARINE SERVICES, INC.,
*Defendants- Cross Defendants-Appellees*,
UNIVERSAL OGDEN SERVICES,
*Defendant- Appellee,*
FOREST OIL CORP.,
*Defendant-Cross Claimant-Third Party Plaintiff- Appellee-Cross-Appellant,*
v.

SECURITY INSURANCE CO. OF HARTFORD
*Third Party Defendant-Appellee*

Appeals from the United States District Court
for the Western District of Louisiana

Before JONES and DeMOSS, Circuit Judges, and LIMBAUGH,[1] District Judge.

## OPINION

On July 6, 1995, Peter Dahlen injured his back aboard an oil platform while unloading groceries from an eight-foot square metal grocery box. The platform is owned and operated by Forest Oil Corporation ("Forest"). Dahlen sued Forest, as well as the grocery supplier, Universal Ogden Services ("Universal"), and the chartered ship owner, Gulf Crews, Inc. and Gulf Marine Services, Inc. ("collectively, "Gulf") for negligence. The district court granted Universal's and Gulf's motions for summary judgment on the basis that they owed no duty to Dahlen. At trial, a jury found that Forest was not negligent and Dahlen now appeals. On appeal, Dahlen claims: (1) the jury charge was erroneous as to the legal standard of negligence it set forth; (2) the jury charge was erroneous as to the duty that was owed by Forest as the time charterer; (3) the jury's findings were erroneous; and (4) it was error to grant Universal's motion for summary judgment.

## BACKGROUND

Forest Oil Company is the owner and operator of several platforms producing oil and gas in the Gulf of Mexico, including, for the purposes of this suit, West Cameron 44, High Island 116 and High Island 820. All three of these artificial islands are located approximately one and a

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[1] District Judge of the Eastern District of Missouri, sitting by designation.

half hours by boat from each other and are on the Outer Continental Shelf adjacent to the State of Louisiana. In July 1995, the plaintiff, Peter Dahlen, was an employee of Island Operating, but was assigned to work for Forest on Forest's production platforms in the Gulf of Mexico. Dahlen was employed as a barge operator. At the time of his employment, Dahlen had no physical restrictions and was in good health.

Forest purchased groceries for their offshore platforms from Universal Ogden Services. On July 5, 1995, Forest made a grocery order for West Cameron 44, High Island 116 and High Island 820 from Universal. Universal transported the groceries by truck to a dock in Sabine Pass, Louisiana, and loaded them into an eight-foot square metal blue cube or "grocery box." The grocery box was loaded via crane by Grasso Production Management onto the M/V BILLY JAY, a supply boat owned by Gulf and time chartered by Forest, for transport offshore.

On July 6, 1995, Forest operator, Greg Sweet, instructed Dahlen to go by helicopter to the West Cameron 44 platform and perform routine maintenance and take readings. Sweet also told Dahlen that the M/V BILLY JAY would be arriving with groceries and supplies, which Dahlen should unload. When the BILLY JAY arrived, Dahlen offloaded the grocery box using a crane. When Dahlen opened the box, he found that it had been loaded in such a manner that the supplies for West Cameron 44 were in the back of the box. Because the box only had a single door by which to access its contents, in order to unload the supplies for West Cameron 44, Dahlen had to take everything out of the box, set aside the supplies for his platform, and then reload the other platforms'

supplies into the box. This whole process took approximately one hour.

Dahlen claims this activity caused him to suffer a back injury and he had to fly back to shore the next day due to the pain he was experiencing. He had extensive conservative treatment, which proved ineffective. Eventually, Dahlen had to undergo a posterior/anterior two-level lumbar fusion surgery, using hardware to stabilize his back. Dahlen claims that he has not worked since the incident, and that he continues to suffer from pain and depression and that his medications cost $509 per month.

On May 2, 1996, Dahlen filed suit for negligence in the 38th Judicial District Court, for the Parish of Cameron, State of Louisiana. Made defendants were: Gulf, Universal, and Forest. Dahlen maintained that it was negligent, on the part of the defendants, to load the groceries in the order that they did. Dahlen asserted that there was a duty to load the groceries according to a "first in, last out" rule so that he would not have had to unload the groceries destined for the other platforms. On May 28, 1996, the defendants timely removed the action to federal court, invoking federal question jurisdiction via the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331, *et seq.* All three defendants filed motions for summary judgment. Universal and Gulf were granted their motions on the grounds that they owed no legal duty to Dahlen. Forest was granted its motion for summary judgment as to liability as the platform owner because Dahlen did not premise his claim on platform liability, but rather on Forest's duty as the time charterer of the BILLY JAY. Forest's motion to dismiss the claim against it as time charterer was denied and the claim went to trial. A

jury found that Forest was not negligent and Dahlen appealed. Forest also appealed a refusal by the court to grant Forest indemnity under the charter contract between it and Gulf.

## DISCUSSION

### The district court's application of the Admiralty Extension Act

Forest contends that the district court erred in its finding that the Admiralty Extension Act applied, making maritime law also applicable. Forest is under the misconception, however, that this error would deprive the district court of jurisdiction. Forest then goes on to state that the district court allowed liability premised on 33 U.S.C. § 905(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), which was grounded in admiralty jurisdiction. Forest therefore seems to argue that, had the district court not used the Admiralty Extension Act, the court would lack subject-matter jurisdiction. The plaintiff responds simply by endorsing the district court's application of the Extension Act.

Neither party nor the district court thought about determining whether jurisdiction could be premised in the OCSLA. The West Cameron 44 platform is a fixed production platform, or artificial island, located on the Outer Continental Shelf (OCS). As such, injuries that occur on the platform are subject to Federal jurisdiction. 43 U.S.C. § § 1333(a)(1)

and1349(b).[2] The district court clearly found that the claim is governed by the OCSLA; the apparent confusion over jurisdiction seems to arise from the court's statement that "when an event occurs on an OCSLA situs, and maritime law is also applicable, then maritime law controls." What the parties fail to notice is that the court used the word "also" in referring to the applicability of maritime law and cited *Smith v. Penrod Drilling Corp.*, 960 F.2d 456, 459 (5th Cir. 1992). The district court was premising its decision on *Smith*, which relied, in part, on *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, 895 F.2d 1043 (5th Cir. 1990), to determine whether to apply state law or federal maritime law to an action pursuant to § 1333(a)(2)(A) of the OCSLA. *PLT* stated that:

> For adjacent state law to apply as surrogate federal law under OCSLA, three conditions are significant. (1) The controversy must arise on

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[2] 43 U.S.C. § 1349(b) states, in relevant part:

> The district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf.... Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

> a situs covered by OCSLA (i.e. the subsoil, seabed, or artificial structures permanently or temporarily attached thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with Federal law.

*Id.* at 1047. We assume the district court was focusing on the second prong of *PLT* when it decided that the Admiralty Extension Act was applicable and so maritime law applied of its own force. The decision to apply maritime law, however, has nothing to do with whether or not a federal court has jurisdiction. It clearly does. *See* § 1349(b).

Satisfied that the district court had subject-matter jurisdiction of this controversy and that the case was properly removed from state court, we turn to the issue raised by Forest of whether it was error to apply the Admiralty Extension Act to the present case. We review the district court's conclusions of law *de novo*. *Dow Chem. Co. v. M/V Roberta Tabor*, 815 F.2d 1037, 1042 (5th Cir. 1987). The district court found that maritime law controls the instant case by way of 46 U.S.C. § 740, The Admiralty Extension Act, which states, in relevant part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In reaching this conclusion, we think the district court erred.

In order to invoke maritime jurisdiction under the Extension Act, a plaintiff injured on shore must allege that the injury was caused by "a defective appurtenance of a ship on navigable waters." *Margin v. Sea-Land Services, Inc.*, 812 F.2d 973, 975 (5th Cir. 1987). The district court relied on Supreme Court cases that have held that a defective cargo container is considered an appurtenance of a ship to hold that the grocery box was also an appurtenance. *See Victory Carriers, Inc. v. Law*, 404 U.S. 202, 210-211, 30 L. Ed. 2d 383, 92 S. Ct. 418 (1971) (endorsing the concept that an appurtenance of a ship falls under the Extension Act); *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 10 L. Ed. 2d 297, 83 S. Ct. 1185 (1963) (applying maritime law when a longshoreman was injured on a dock by defectively bagged beans). The district court felt that Dahlen's injury was due to an allegedly improperly loaded and/or negligently transported cargo container and that this was not significantly distinguishable from the loading of beans in inadequate containers as alleged in *Gutierrez*. We disagree.

In *Gutierrez*, the Supreme Court applied the Extension Act to provide compensation for a longshoreman who was injured on a dock by defective cargo containers being unloaded from a ship located on navigable waters. *Gutierrez*, 373 U.S. at 209-10. The Supreme Court warned, however, in *Victory Carriers, Inc. v. Law*, that when deciding to extend admiralty jurisdiction under the Act, the courts should act with caution. 404 U.S. at 212; *R.O. Bennett v. Faircape Steamship Corp.*, 524 F.2d 979, 981 (5th Cir. 1975). In *Victory*, the Court was faced with whether to extend admiralty

jurisdiction to a man who was injured on the dock while operating a forklift machine to load cargo onto a ship. *Victory,* 404 U.S. at 203. The Court declined to extend admiralty jurisdiction, reasoning that state law traditionally governed accidents such as the one with which they were faced. 404 U.S. at 211-212. The *Victory* Court also specifically noted that *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263, 66 L. Ed. 933, 42 S. Ct. 473 (1922), had not been overruled. *Victory* , 404 U.S. at 210. In *Nordenholt*, the Supreme Court held that compensation for a longshoreman, who was injured when he slipped on a dock while stacking bags of cement that had been unloaded from a ship, was governed by local law, not federal maritime law. *Nordenholt,* 259 U.S. at 275-76. Most recently, this Circuit interpreted the two Supreme Court decisions in *Victory* and *Gutierrez* stating that the Extension Act is meant to apply to the vessel and her appurtenances "and does not include those performing actions for the vessel." *Egorov, Puchinsky, Afanasiev & Juring v. Terriberry, Carroll & Yancy,* 183 F.3d 453, 456 (5th Cir. 1999). This Circuit has also noted that, since the *Gutierrez* ruling, the LHWCA has been amended "to cover employees working on those areas of shore customarily used in loading, unloading, repairing, or building a vessel." *R.O. Bennett,* 524 F.2d at 980.

At least three factors, therefore, mitigate against the application of *Gutierrez*. First, *Gutierrez* is factually distinguishable. *Gutierrez* involved a plaintiff who was injured when he slipped on some beans that spilled out of a *defective* bag *while* it was being unloaded (not after it had been placed on the dock). Also, at the time *Gutierrez* was decided, the LHWCA did not contain the provisions it does today extending coverage to activities of loading and unloading

ships while on the adjacent dock or pier. Second, no case cited by either party or the court deals with the use of the Extension Act in conjunction with the OCSLA, which has its own provisions concerning the application of state law. If the reasoning of *Victory* holds true, then state law concerns should mitigate against application of the Extension Act. Furthermore, the OCSLA specifically regards the artificial islands on the OCS as areas where state law should apply unless there is a conflict with federal law. *See Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 363, 23 L. Ed. 2d 360, 89 S. Ct. 1835 (1969) (stating that the application of maritime law is inapposite to fixed structures on the OCS). Third, the holding of this Circuit in *Egorov* makes it clear that for the Extension Act to apply, the defect must be in the appurtenance and not be due to the personnel performing services for the vessel. *Egorov,* 183 F.3d at 456. What is alleged in the present case is not a defect in the grocery box but in the manner in which groceries were loaded into the box. *Egorov* clearly indicates that the Extension Act should not apply to such a case. This Court, therefore, holds that the Admiralty Extension Act was improperly applied in the present case and that Louisiana state law, not federal maritime law, should have applied to this negligence action. As it turns out, however, whether Louisiana state substantive law is applied or not does not affect the outcome of the case.

**The district court's instructions to the jury as to the applicable standard for negligence**

This Court reviews challenges to jury instructions for abuse of discretion and will reverse a judgment "only if the charge as a whole creates a substantial doubt as to whether the jury has been properly guided in its deliberations." *C.P.*

*Interests, Inc. v. California Pools, Inc.*, 238 F.3d 690, 700 (5th Cir. 2001) (quoting *FDIC v. Mijalis*, 15 F.3d 1314, 1318 (5th Cir. 1994) (internal citation omitted)). However, even if the jury instructions were erroneous, "we will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case." *Johnson v. Sawyer*, 120 F.3d 1307, 1315 (5th Cir. 1997). Under Rule 51 of the Federal Rules of Civil Procedure, "No party may assign as error the giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." A failure to object, however, will not act as a jurisdictional bar to review and this court will entertain tardy objections to jury instructions under the plain error standard of review. *Tompkins v. Cyr*, 202 F.3d 770, 783 (5th Cir. 2000). "In reviewing jury instructions for plain error, we are exceedingly deferential to the trial court." *Id.* at 784.

Prior to the jury's deliberations, Dahlen requested the following jury charge, which was given by the court:

> A tortfeasor takes the victim as he finds him and is responsible in damages for consequences of his tort even though the damages are greater because of the victim's prior condition. When the defendant's negligent act aggravates a preexisting condition or injury, the victim is entitled to compensation for the full extent of the aggravation.

This charge was meant to inform the jury of the "eggshell skull" doctrine. After deliberations began, the jury asked the district judge to further define "an unreasonable risk of foreseeable injury," which appeared in one of the jury issues or instructions regarding negligence. The district judge instructed the jury to refer to Section V (entitled applicable law), of the jury charge in its entirety. Dahlen contends that the district court should have given the jury further instructions, informing the jury that the defendants could be found negligent even if the injury that resulted was unforeseeable. Dahlen now appeals this failure as error. Dahlen admits that he did not object to the jury instructions as to this aspect prior to deliberations, but contends that this was only because it was not clear, until the jury questioned the charge, that further instructions were needed.

The "eggshell skull" doctrine requires a defendant to compensate a plaintiff for unforeseeable injuries flowing from some pre-existing physical condition. *Munn v. Algee*, 924 F.2d 568, 576 (5th Cir. 1991) (citing Rest. 2d of Torts § 461 (1977)). Section 461 of the Restatement Second of Torts defines the doctrine more specifically as follows:

> The *negligent* actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct.

§ 461 (emphasis added). This definition, therefore, requires that the actor be negligent first, before the doctrine can come

into play. This is supported by the heading under which § 461 is listed, i.e., "Causal Relation Affecting the Extent of Liability But Not Its Existence."

As stated above, under *PLT*, once we have determined that the harm occurred on the OCS and that federal maritime law does not apply of its own force, we must still determine whether substantive state law is in conflict with existing federal law. *PLT,* 895 F.2d at 1047. A review of Louisiana case law reveals that § 461 of the Restatement Second is relied upon by their courts as well. *See Thames v. Zerangue,* 411 So. 2d 17, 19 (La. 1982) (holding that a tortfeasor is responsible for the consequences of his tort even if the damages are increased due to a pre-existing condition); *Reck v. Stevens,* 373 So. 2d 498, 502 (La. 1979) (quoting Rest.2D of Torts 461); *Burnaman v. Risk Mgmt., Inc.,* 97-250 (La.App. 3 Cir, 06/18/97), 698 So. 2d 17 (quoting *Reck*, 373 So. 2d at 502). Louisiana courts have consistently held that "when the defendant's *tortuous* conduct aggravates a pre-existing condition, the defendant must compensate the victim for the full extent of the aggravation." *Lasha v. Olin Corp.,* 625 So. 2d 1002, 1006 (La. 1993) (emphasis added); *see also Aisole v. Dean,* 574 So. 2d 1248, 1253 (La. 1991); *Bush v. Arrow Int'l,* 94-373 (La. App. 3 Cir. 11/23/94), 646 So. 2d 1173, 1178 (La. Ct. App. 1994); *Thibodeaux v. Winn-Dixie of La., Inc.,* 608 So. 2d 673, 675 (La. Ct. App. 1992) ("Where a defendant's negligent action aggravates a preexisting injury or condition, he must compensate the victim for the full extent of the aggravation."). Therefore, Louisiana law requires that a defendant be negligent before the "eggshell skull" doctrine can take effect and this is not in conflict with any federal law.

Appellant Dahlen would have this Court believe that the "eggshell skull" doctrine applies before liability is found, but even the cases cited in support of this contention actually go to damages and not liability. The rule, as applied to the present case, merely states that if a further unforeseeable injury occurs to a victim with a pre-existing condition due to a torteasor's *negligence*, that tortfeasor will still be held liable for the increased damages. *Perniciaro v. Brinch*, 384 So. 2d 392, 396 (La. 1980) ("Where the defendant's negligent action aggravates a pre-existing injury, he must compensate the victim for the full extent of this aggravation."). The defendant must be negligent first, however. We therefore conclude that the district court's instructions to the jury were not erroneous.

**The district court's instructions to the jury as to the duty owed by Forest**

In addition to the above claim, Dahlen also contends that the district court erred in its instruction to the jury regarding the duty owed by a time charterer. The jury charge complained of states:

> The vessel charterer has the legal duty to exercise only reasonable care to have the vessel and cargo in such condition that the platform owner and its employees and workers would be able by the exercise of reasonable care to carry on the work of unloading the cargo with reasonable safety to persons and property.
>
> The charterer has no duty to supervise or inspect the loading or unloading of the cargo

or to warn of open and obvious conditions.

Dahlen claims that this charge was based erroneously on *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156, 68 L. Ed. 2d 1, 101 S. Ct. 1614 (1981). Dahlen contends that the standard that should apply was enunciated in *Hodgen v. Forest Oil Corp.,* 87 F.3d 1512 (5th Cir. 1996). Forest contends that *Scindia* and *Howlett v. Birkdale Shipping Co.,* 512 U.S. 92, 129 L. Ed. 2d 78, 114 S. Ct. 2057 (1994) enunciate the appropriate standard because *Hodgen* only applies when a vessel charterer sends a boat into perilous weather conditions. In the alternative, Forest argues that the district court's instruction is harmonious with the *Hodgen* court's standard.[3]

*Hodgen* states that "a time charterer owes a hybrid duty arising from tort law to exercise the control the charter affords it[4] over the timing, route, and cargo of a vessel's

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[3] There is no need to examine separately Louisiana law as Louisiana courts' have relied on Fifth Circuit precedent to determine the liability of a time charterer. *Wall v. Progressive Barge Line, Inc.,* 97-0665 (La.App. 4 Cir. 10/29/97), 703 So. 2d 681, 685-688 (La.App. 1997) (finding that federal substantive maritime law often applies to such issues).

[4] The charter agreement states, in relevant part:

> The vessel shall prosecute its trips and perform its services as requested by CHARTERER, but sole responsibility for management, navigation and operation of the vessel (and all decisions as to whether the vessel can operate safely in various sea and weather conditions) shall remain at all times

journey in a reasonably prudent manner." *Hodgen,* 87 F.3d at 1517. Dahlen relies on this statement in his contention that this imposes a duty on the time charterer to order that the groceries be loaded into the box in accordance with the "first in-last out" principle. The *Hodgen* court went on to state the duty owed in more specificity later on in the opinion, stating that case law "establishes that the traditional spheres of activity in which a time charterer exercises control and thus owes a duty include choosing a vessel's cargo, route, and general mission, as well as the specific time in which the vessel will perform its assignment." *Id.* at 1520. *Hodgen*, and the cases it relied on, however, all involved situations where a plaintiff was hurt while transferring from a vessel to a platform, or vice versa, and almost always involved perilous weather conditions or rough seas. Dahlen wishes to extend the reasoning of *Hodgen* to a set of circumstances wholly unforeseen by the *Hodgen* court. We are unwilling to do so in the present situation.[5]

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with the OWNER, same as when trading for the OWNER's account.

[5] Even if we accept Dahlen's contention that *Hodgen* should apply, the standard charged by the court in the present case does not vary significantly from the standard stated in *Hodgen* and certainly doesn't rise to the level of demonstrating that "the charge as a whole created substantial and eradicable doubt" that the jury had been properly guided in its deliberations as the standard of review requires. *Johnson,* 120 F.3d at 1315. The *Hodgen* standard includes a duty in choosing the cargo, but not in how groceries should be loaded into a box that will become cargo. Therefore the district court's charge was not erroneous even under *Hodgen*.

Though we do not accept Dahlen's contention that *Hodgen* applies, we also note that the standard articulated in *Scindia* and *Howlett* does not explicitly apply to time-charterers. *Kerr-McGee Corp. v. MA-JU Marine Servs., Inc.*, 830 F.2d 1332, 1340 n.8 (5th Cir. 1987) (suggesting that the duties prescribed in *Scindia* only apply to true owners or other parties with similar dominion over the boat); but *see Woods v. Sammisa Co.*, 873 F.2d 842, 847 n.6 (5th Cir. 1989) (recognizing *Kerr-McGee* but applying *Scindia* nonetheless because the time-charterer may have similar duties under the time-charter agreement and the time-charterer before the Court assessed its own liability under the *Scindia* standard). *Howlett*, a case based on the reasoning in *Scindia*, involved the duty owed by a shipowner to a longshoreman who was injured while discharging bags of cocoa beans from the cargo hold of a vessel. *Howlett,* 512 U.S. at 94. The Supreme Court in *Howlett* stated that a vessel's duty to warn of latent defects in the cargo stow and area is a narrow one, and that the duty only attaches to "hazards that are not known to the stevedore and that would be neither obvious to nor anticipated by a skilled stevedore in the competent performance of its work." *Id.* at 105. The Court also stated that the duty would only encompass hazards that are known, or should be known to the vessel through the exercise of reasonable care. *Id.* (citing *Scindia Steam,* 451 U.S. at 167). Under the standard enunciated in *Howlett*, the jury instructions would not be erroneous. Though *Howlett* deals with the relationship between a longshoreman and a vessel owner, the circumstances involved in *Howlett* are more akin to the

present situation than the circumstances involved in *Hodgen*.[6] As we can find no other case articulating the duty owed by a time-charterer in such a situation, we hold that the district court did not abuse its discretion by issuing the jury instructions that it did, and that the instructions given by the district court did not create a substantial doubt as to whether the jury was properly guided in its deliberations as required by the standard of review.

**The jury's findings**

Dahlen further alleges that the jury and district court erred in finding no liability on the part of Forest in its capacity as time charterer, and that the district court improperly denied his motion for a new trial. This Court grants great deference to a jury's verdict and will reverse only if, when viewing the evidence in the light most favorable to the verdict, the evidence points so strongly and overwhelmingly in favor of one party that the court believes that reasonable jurors could not arrive at any contrary conclusion. *Baltazor v. Holmes*, 162 F.3d 368, 373 (5th Cir. 1998). A motion for a new trial should not be granted unless the verdict is against the great weight of the evidence, not merely against the preponderance of the evidence. *Carter v. Fenner,* 136 F.3d 1000, 1010 (5th Cir. 1998).

Dahlen contends that the jury could not have found against him because the evidence clearly established a duty to

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[6] We do not intend, however, to indicate that Dahlen is a longshoreman or stevedore or that Forest is the vessel owner. We only hold that the situation involved is more compatible with the duty enunciated in *Howlett*.

load the groceries in a "first in-last out" manner or to direct the route in accordance with how the groceries were loaded. Many of Dahlen's arguments simply rely on the fact that the jury instructions were erroneous and ignores the many factors that come into play when a jury is deliberating over the existence of negligence, such as proximate cause. Dahlen's conclusory allegations do not overcome the extremely high burden placed on him and so the jury's findings are affirmed. *See Vadie v. Mississippi State Univ.*, 218 F.3d 365, 372 (5th Cir. 2000) (quoting Fed.R.Civ.P. 50(a)(1), stating that "[a] jury verdict must be upheld unless 'there is no legally sufficient evidentiary basis for a reasonable jury to find' as it did.").

**The district court's granting of Universal's motion for summary judgment**

Dahlen's final issue on appeal is that the district court erred in granting Universal's motion for summary judgment. The district court granted Universal's second motion after initially denying a first motion for summary judgment. In granting the motion, the district court cited to *Chavez v. Noble Drilling Corp.*, 567 F.2d 287 (5th Cir. 1978), to support its conclusion that Universal owed no duty.

This Court reviews a grant of summary judgment in the trial court *de novo*, applying the same standard used by the trial court in ruling on the motion under Rule 56 of the Federal Rules of Civil Procedure. *Hirras v. Nat'l R.R. Passenger Corp.*, 95 F.3d 396, 399 (5th Cir. 1996). Dahlen contends that the district court erred in applying *Chavez* in the manner it did and, in the alternative, that it should have applied *Couch v. Cro-Marine Transport, Inc.*, 44 F.3d 319

(5th Cir. 1995). Universal contends that the district court was correct in its application of *Chavez* and that it also owes no duty under Louisiana law. We find the *Chavez* opinion to be controlling.

In *Chavez*, the plaintiff, Anthony Chavez, suffered a back injury on an oil platform located on the OCS. Chavez injured his back when he lifted an unlabeled box of groceries weighing over one hundred pounds. *Chavez,* 567 F.2d at 288. Chavez sued the platform owner for failing to provide him with assistance and the grocery supplier for failing to label the box as to weight. *Id.* The grocer was granted its motion for summary judgment and Chavez appealed. This Court stated that it was faced with choosing between Louisiana law and federal maritime law as to what standard of negligence to apply. *Id.* The court stated that under the Louisiana law, the courts were to apply a "duty/risk" analysis to determine whether a defendant's conduct was the legal cause of the plaintiff's injury. *Id.* (citing *Hill v. Lundin & Assoc., Inc.,* 260 La. 542, 256 So. 2d 620 (La. 1972). Under this analysis, the court decided that the grocer owed no duty to Chavez to label the boxes as to weight, stating that the only duty owed was to properly pack the groceries. 567 F.2d at 289. The court did not end its analysis there, however, as it went on to determine whether the grocer would have been negligent under federal maritime law. The court noted that in federal maritime law, the courts have adopted the Restatement Second of Torts approach of "legal cause." *Id.* at 289. The court thus concluded that this standard involves a concept of duty or a legally-protected interest. *Id.* Having already found no duty to exist, the court therefore found that the grocer was not negligent under either standard.

Dahlen contends that because the *Chavez* court stated that there was a duty to properly pack the groceries, the district court should have found that there was a similar duty to pack them in the order of the deliveries. This is an incorrect application of the "duty/risk" analysis, however, which avoids the realities of the situation and imposes artificial and unrealistic standards. *Chavez*, 567 F.2d at 289. The record does not establish that Universal had any affirmative duty to find out what order the deliveries were to be made in. Also, the record fails to establish that the "first in-last out" rule that Dahlen cites to is anything more than a rule of convenience rather than one of safety. As the district court pointed out, any duty that would be owed did not encompass the harm in this situation. Summary judgment was therefore properly granted to Universal.[7]

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[7] Even under the language that Dahlen contends should control in this case, i.e., the *Couch* standard, no duty is owed by Universal. In *Couch*, the court stated:

> We hold that a loading stevedore must load the cargo so that an expert and experienced stevedore will be able to discharge the cargo with reasonable safety by exercising reasonable care.

*Couch*, 44 F.3d at 327. Even if this standard is used, Universal met its duty. Nothing in the record indicates that the way the groceries were loaded made it so that an experienced stevedore could not unload the cargo with reasonable safety.

**The district court's dismissal of Forest's cross-claim for indemnity**

The final issue on appeal is a cross-appeal brought by Forest arguing that it was error for the district court to deny its indemnity claim. The interpretation of indemnity clauses is a matter of law that is reviewable *de novo* on appeal. *Smith v. Tenneco Oil Co.*, 803 F.2d 1386, 1388 (5th Cir. 1986) (citing *Kemp v. Gulf Oil Corp.*, 745 F.2d 921, 924 (5th Cir. 1984)). District court interpretations of insurance policies are also reviewed *de novo*. *Harbor Ins. Co. v. Urban Constr. Co.*, 990 F.2d 195, 199 (5th Cir. 1993).

Security contends that in order for Forest to prevail, it must overcome two obstacles. First, Forest must prove that the injury to Dahlen arose out of or was related to the performance of the vessel charter. Second, Forest must prove that Dahlen, already deemed a borrowed servant of Forest, was not a Forest employee for the purposes of the insurance clause in the vessel time charter. Forest contends that because it was sued in its capacity as the time charterer of the vessel, they are entitled to coverage under the Gulf charter agreement. Forest also contends that, though it was found to be the borrowing employer for the purposes of liability to Dahlen, it is not his employer under the insurance policy, citing *Johnson v. Amoco Prod. Co.*, 5 F.3d 949 (5th Cir. 1993) and *Melancon v. Amoco Prod. Co.*, 834 F.2d 1238 (5th Cir. 1988) as support.

Security's first argument that Forest cannot claim indemnity because the injury did not relate to the performance of the vessel is correct. Gulf's charter agreement states, in clear and unambiguous language, that indemnification under

Gulf's insurance policy is triggered when an injury arises out of or is related to the performance of the vessel during the charter. The agreement states, in part:

> Owner agrees to indemnify, defend and save harmless Forest Group . . . from and against any and all claims, demands, judgments, defense costs, or suits . . . by any vessel, entity or person (other than the employees of the CHARTERER) in any way arising out of or related to the performance of this contract . . . .

The district court found that the present case did not arise out of or relate to the performance of the vessel during the charter and that Forest, therefore, had no claim. We agree. The present injury in no way related to the performance of the charter contract. The grocery box was not loaded by Gulf but rather by Universal. The box was not put on board the BILLY JAY by Gulf but was loaded via a crane located at the Sabine Pass dock by a third party, Grasso Production Management. Also, the box was not unloaded from the BILLY JAY by Gulf but rather by Dahlen himself using a crane located on the Forest platform. Dahlen never boarded the BILLY JAY and no crew members of the BILLY JAY ever went on the platform to assist Dahlen in taking the groceries out of the grocery box. Therefore, under the terms of the charter agreement itself, Forest is not entitled to indemnification.

Security's second argument equally justifies a finding in its favor. The insurance policy states, in relevant part:

> The Assurer hereby undertakes to make good to the Assured [Forest] . . . all such loss and/or damage and/or expense as the Assured shall as owners of the vessel named herein have become liable to pay and shall pay on account of the liabilities, risks, events and/or happenings herein set forth:
>
> > (1) Liability for loss of life of, or personal injury to . . . any person, excluding however, unless otherwise agreed by endorsement hereon, liability under any Compensation Act to any employee of the Assured.

As Forest is being sued under the LHWCA, the only question becomes whether Dahlen was its employee for purposes of the indemnity provision.[8] Forest tries to distinguish the finding that it is Dahlen's borrowing employer on the grounds that *Johnson* and *Melancon* both allowed the platform owner to be considered the borrowing employee for the purposes of the LHWCA but not for the purposes of indemnity between the borrower and the borrowee, i.e., the entity that lent the employee to Forest. As Security points out, however, Forest is not seeking indemnity from the company that it borrowed Dahlen from (in this case Island), but is instead seeking indemnity from a third party that for all

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[8] As stated above, the charter agreement also contains a similar provision providing indemnity to any employee other than employees of the charterer.

accounts is unrelated in any way to Dahlen.[9] The reasoning of the district court that Forest was the borrowing employer should therefore be upheld.

## CONCLUSION

Having heard the oral arguments of the parties, and having carefully reviewed the record of this case and the parties' respective briefs and for the reasons set forth above, we conclude that the district court's jury instructions were not erroneous and that the jury's verdict should remain undisturbed. We also conclude that the district court did not err in granting Universal's motion for summary judgment or in dismissing Forest's cross-claim for indemnity. We therefore AFFIRM the district court's decision.

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[9] Dahlen was never employed by Gulf and was never even aboard a ship at any time during the relevant events. He unloaded the grocery box with a crane and was not injured until the box was on the platform.

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF LOUISIANA**
**LAKE CHARLES DIVISION**

**[Filed September 11, 2000]**

**No. 96-1300**

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|---|---|
| PETER J. DAHLEN | ) |
| | ) |
| v. | ) |
| | ) |
| GULF CREWS, INC. | ) |
| ET AL | ) |
| | ) |

**JUDGES:**
Judge Trimble
Magistrate Judge Wilson

**JUDGMENT**

Having reviewed Forest Oil Corporation's claim for insurance coverage under the Security Insurance Company of Hartford, Inc.'s Protection and Indemnity Policy with Gulf Crews, Inc., and having considered the objections filed,

In accordance with the reasoning of the attached Memorandum Ruling it is ORDERED, ADJUDGED AND DECREED that Forest Oil Corporation's claim for insurance

coverage is hereby DENIED.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 8th day of September, 2000.

/s/ _____
James T. Trimble, Jr.
United States District Court Judge

## APPENDIX D

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF LOUISIANA**
**LAKE CHARLES DIVISION**

**[Filed September 11, 2000]**

**No. 96-1300**

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| GULF CREWS, INC. | ) |
| ET AL | ) |
| | ) |

**JUDGES:**
Judge Trimble
Magistrate Judge Wilson

**MEMORANDUM RULING**

All other claims and issues having been decided by jury verdict and judgment for Forest Oil Corporation ["Forest"], the issue remaining before this court is a determination on Forest's claim for indemnification under Security Insurance Company of Hartford, Inc.'s ["Security"] Protection and Indemnity Policy ["P&I"] with Gulf Boat Marine Services, Inc. and/or Gulf Crews, Inc. ["Gulf

Crews"]. We reiterate so much of our Memorandum Ruling of January 9, 1998 [doc 96] as denies Forest indemnification by Gulf Crews as a matter of law, and once again deny Forest's claim for indemnification from Security.

## FACTS AND ANALYSIS

Plaintiff Dahlen, an offshore laborer working as a borrowed employee from Island Operating Co., Inc. ["Island"] for Forest on the fixed offshore oil platform known as West Cameron 44, was injured in 1995 while unloading groceries from an 8' by 8' box containing goods intended for three platforms, which had been packed by Universal Ogden Services ["Universal"] and delivered to West Cameron 44 by Gulf Crews, from its vessel, the M/V Billy Jay, upon Forest's order and charter. Forest was both the platform owner and operator and the charterer of the oil platform supply vessel; by prior ruling and by jury verdict Forest was absolved in all its capacities of liability for Dahlen's injuries. In 1998, by motion to this court, Forest attempted to invoke indemnification from Gulf Crews for any finding of liability and all costs associated with its defense on Dahlen's claims. That motion was denied with prejudice and an order to show cause pursuant to Federal Rule of Civil Procedure 11 (b-c), as it was determined that in arguing its summary judgment motion to the court, Forest had misrepresented the indemnity agreement's terms by altering the relevant clause excluding all employees of the charter from coverage under the policy, to one of its own devising – "(other than the employees of Gulf Boat Marine Services)" – in order to obscure its lack of standing under the plain and unambiguous language of the insurance contract.

In this second attempt at the same motion, Forest provides no new legal authority for its claim for indemnification from Security through Gulf Crews' policy [HMP-100105], but simply invokes the insurance contract clause which "provides the authority to the named assured (Gulf Crews) to name as additional assureds those corporations for whom Gulf Crews is working or where required by contract." [doc 349 at 2] Forest asserts that by this clause and by its "Blanket Time Charter" of the M/V Billy Jay with Gulf Crews, which "required compliance with certain minimum insurance requirements, including [that they]... name Forest as an additional assured" [*ibid*] it is thereby insured by Security. It is in this role as time charterer and therefore as Gulf Crews' additional assured that Forest seeks indemnification from Security for costs associated with its defense.

Security does not dispute that Forest is an additional assured, but asserts that the additional assured is entitled to no more coverage than the named assured has under the policy. [doc 350 at 5] In this instance, Security's policy states in clear and unambiguous language that indemnification under Gulf Crews' insurance cover is triggered when an injury arises out of or is related to the performance of the vessel during the charter. It is settled that a time charterer may be liable for vessel-related negligence. (*Randall v. Chevron USA, Inc.*, 13 F.3d 888 (5th Cir. 1994), *Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir. 1983)). These cases, however, invoke liability and indemnification where the injuries are "vessel-related" (*Randall*, at 909, *citing* 788 F. Supp. at 1403, *Helaire*, at 1042.) The jury having found for Forest determined that Dahlen's injuries were not vessel-related. *Randall* and *Helaire* therefore do not control in this case. As Forest in its capacity

as the charterer was found not liable for Dahlen's injuries, and the vessel M/V/ Billy Jay was not implicated in any cause of action. Dahlen's injuries did not arise out of or relate to the performance of the vessel. Security therefore has no duty to indemnify Forest.

Security argues further that its policy with Gulf Crews specifically excludes injuries to employees of the insured, and that Dahlen, as a borrowed employee of Forest, would therefore be specifically excluded under the policy, had his injuries been deemed to have been caused by Forest as the charterer. The plain and unambiguous language of the relevant clause in the insurance policy was determined by this Court's prior ruling [doc 96] to read in part that "Owner [Gulf Crews] agrees to indemnify, defend and save harmless Forest Group... from and against any and all claims, demands, defense costs, or suits (including but not limited to those for property damage, bodily injury, illness, disease, death or loss of services, or wages) by any vessel, entity or person (other than the employees of the charterer [Forest]) in any way arising out of or related to the performance of this contract (which shall be deemed to include, without being limited to, transportation, the loading or unloading of the vessel, and ingress and egress to the vessel)." In this Court's Memorandum Ruling denying Forest's claim for indemnification by Gulf Crews [doc 96], we stated the law of this case, which has not changed. The unambiguous meaning of "other than the employees of the charterer" specifically excludes insurance coverage for Dahlen by Gulf Crews. As Gulf Crews' insurer, Security is no more liable for indemnification for injuries to the time charterer's employees than is Gulf Crews itself.

Forest further attempts to obscure what it says is the plain meaning of the policy, by ignoring the relevant clause referring to the indemnity obligation triggered by vessel performance, and focusing instead on the deletion of the phrase "as owner," from the policy. Forest argues that this phrase refers to the platform owner, and has therefore been erroneously construed to mean Forest in its capacity as platform owner, but since Forest has actually been sued in its capacity as time charterer, it falls within the indemnification obligation of the insurance contract. Security, on the other hand, asserts that the deletion of the "as owner" clause from the policy simply extends the coverage to the time charterer by eliminating obscuring language which might otherwise be wrongly construed to mean "only" the owner, excluding the charterer. Form the evidence it is not clear whether an owner's policy would have an exclusionary clause relevant to its own employees' injuries, or whether it would, as owner, be covered for injuries by its own employees. Nevertheless, we find that the phrase "as owner" whether included or deleted from this policy has no bearing on the present case, as Forest's right to indemnification under Gulf Crews' policy with Security does not rest on, nor is it defeated by, the use of the phrase "as owner." What is relevant is that the policy as to Forest specifically excludes employees of the time charterer, and draws no distinction between time charterers acting as time charterers, or time charterers acting in lieu of/or as owners.

Finally, Security asserts that "once the vessel and Gulf Crews were dismissed [from liability]" ... "any potential for coverage, or a duty to defend Forest under the vessel's policy" is ended. [doc 350 at 2]

After reviewing the record and briefs of Forest and Gulf Crews, and all applicable jurisprudence, we find that the insurance contract's provisions are unambiguous as to Forest's coverage, and that by the terms of the contract, Forest has no claim for indemnification from Security in this instance.

With this ruling, we note that Security is erroneous in its belief that the contractual agreement to defend an additional assured under the vessel's policy is ended once the primary insured is no longer a defendant.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 8th day of September, 2000.

/s/ _____
James T. Trimble, Jr.
United States District Court Judge

Supreme Court, U.S.
FILED
OCT 18 '02
OFFICE OF THE CLERK

No. 02-446 (2)

In the
# Supreme Court of the United States

FOREST OIL CORPORATION,
*Petitioner*,

v.

GULF CREWS INC., GULF BOAT MARINE SERVICES, INC. AND SECURITY INSURANCE COMPANY OF HARTFORD,
*Respondents*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

1. Whether an action brought pursuant to 33 U.S.C. §905(b) arises under the LHWCA for purposes of excluding coverage under a vessel's protection and indemnity policy?

## LIST OF PARTIES

Respondent is Security Insurance Company of Hartford, Inc. Respondent is wholly owned by Royal & Sun Alliance Insurance Group, plc (UK), whose stock is publicly traded on the London Stock Exchange.

Additional parties are Gulf Crews, Inc., Gulf Boat Marine Services, Inc., Peter J. Dahlen and Universal Ogden Services.

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## TABLE OF CITED AUTHORITIES

**Cases:**

*Hodgen v. Forest Oil Corporation*,
87 F.3d 1512 (1996) . . . . . 6

**Statutes:**

33 U.S.C. § 905(b) . . . . . i, 3, 5, 7

## STATEMENT OF FACTS

Forest Oil Corporation ("Forest") was the owner of an offshore platform on which an injury occurred to Peter Dahlen. Forest's wholly owned subsidiary, Island Operating Company ("Island"), operated the platform and was Dahlen's direct employer.

Security Insurance Company of Hartford, Inc. ("Security") was the protection and indemnity (P&I) insurer of the M/V BILLY JAY, a vessel owned and operated by Gulf Boat Marine Services, Inc. and Gulf Crews, Inc. (collectively "Gulf"). The M/V BILLY JAY serviced offshore platforms by bringing to them personnel and supplies. Gulf were original defendants based on Dahlen's allegations they failed to route the vessel to allow the efficient removal of groceries from the vessel, but the Trial Court granted Gulf's motion for summary judgment finding Gulf had no duty with regard to the loading of the grocery box and that Island was directing the movements of the vessel.[1] The summary judgment in favor of Gulf was not appealed.

Trial testimony established that the vessel was working for both Forest and Santa Fe Minerals, Inc., another offshore operator.[2] Island's dispatcher coordinated the routing of the vessel at all relevant times. This coordination was necessary to allow the vessel to work for both companies and to keep accurate the allocation of the charter costs between the companies.[3]

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[1] R. Vol. 3, p. 438.

[2] R. Vol. 14, p. 42, l. 6 - 10.

[3] R. Vol 13, p. 48, l. 22 - p.49, l. 16 (proffered testimony).

Gulf were made cross-defendants to Forest seeking indemnity under a written vessel time charter executed between Forest and Gulf. Security was made a third party defendant by Forest seeking coverage and a defense as an additional assured under the Security policy. Forest's motion for summary judgment on the issue of indemnity under the charter was denied by the Trial Court's January 9, 1998 memorandum ruling.[4] The Court found the charter did not require Gulf to indemnify Forest for claims brought by Forest employees, and in light of the previous ruling finding Dahlen Forest's borrowed employee, Dahlen was considered Forest's employee under the indemnity agreement.[5] This issue was not appealed. Forest appeals only the Fifth Circuit's ruling that Security owed no coverage to Forest under the facts of this case. In light of Forest being ultimately found free of fault for the injury to Dahlen, at issue is Forest's claim for reimbursement of its defense costs.

## REASONS FOR DENYING THE PETITION

### I.

**The Fifth Circuit's classification of Dahlen's 905(b) claim as one "arising under the LHWCA" was accurate and in reference to exclusionary language within Security's policy.**

Security concedes to Forest that the LHWCA via the 1972 amendments did not create a new right of action under

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[4] R. Vol. 4, page 600.

[5] R. Vol. 4, p. 604.

§905(b). Admittedly, these amendments simply preserved the existing right of a worker to sue a vessel, including an employer in the employer's capacity as a vessel owner or time charterer. However, this was not the issue before the Fifth Circuit. The issue before the Fifth Circuit was whether or not coverage was owed to Forest under Security's policy. The Fifth Circuit relied on Security's exclusion for liabilities "under any Compensation Act to any employee of the Assured to deny coverage." The opinion then goes on to state:

> As Forest is being sued under the LHWCA, the only question becomes whether Dahlen was its employee for purposes of the indemnity provision.

The operative word in both the policy and the Fifth Circuit's discussion is "under." The issue then becomes whether the §905(b) claim at issue is one that arises "under" the LHWCA for purposes of this exclusion in the policy. The §905(b) claim arises under the LHWCA because §905(b) allows such claims. Without the language in §905(b), the LHWCA would prevent Dahlen's claim against Forest.

It is clear the Fifth Circuit was not making the pronouncement regarding the origin of §905(b) claims envisioned by Petitioner. The Fifth Circuit was merely recognizing that a §905(b) cause of action comes "under," through, or as a result of, language found in the LHWCA. It is of no moment that such claims existed before the 1972 amendments. The 1972 amendments protected such claims, but such claims are still part of the LHWCA and, for purposes of interpreting this P&I policy, fit within the exclusionary language.

## II.

**While the Fifth Circuit relied on the exclusionary language of the policy, other reasons exist for denying Forest coverage under the policy.**

The Fifth Circuit relied entirely on the aforementioned exclusionary language to deny Forest reimbursement for its defense costs under Security's policy. However, the record also supports denying Forest's claim on the basis that there was no potential for finding vessel-related fault once Gulf was dismissed and because a fact issue existed about whether Forest was the time charterer of the vessel at the time of Dahlen's injury.[6] As a result, regardless of the Fifth Circuit's finding that Dahlen's claim arose under the LHWCA, Forest's claim fails on alternate grounds.

Forest's argument that the lower courts lacked maritime jurisdiction matches Security's lack of coverage argument because of the absence of any vessel-related fault. Without the involvement of the vessel as an instrument to cause the injury to Dahlen, Dahlen lost his basis for maritime jurisdiction. Also, testimony was submitted that the vessel has to have some liability for the P&I coverage to come into play and, further, that the coverage given to a time charterer

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[6] Forest had the benefit of the defense provided by Security on behalf of Gulf and its vessel until Gulf were dismissed. However, Forest remained a defendant for its actions as platform owner and time charterer. Thus, any potential vessel-related liability was defended by Security for the benefit of both Gulf and Forest and any claim by Forest should be for its defense costs subsequent to the dismissal of Gulf and in Forest's capacity as platform owner/time charterer.

is never greater than that given the vessel owner.[7] Thus, Security agrees that it was inconsistent for the lower courts to allow Dahlen his §905(b) claim after it had been determined that the vessel was free from fault.

The lower courts presumably maintained maritime jurisdiction because Forest remained in the case in its capacity as time charterer. Security views the time charterer's potential fault as derivative of vessel-related fault; thus, once the vessel was dismissed the §905(b) claim should have also fallen. This issue became moot once Forest was found free of fault as time charterer; however, the lower courts' failure to address this issue in a way that may have satisfied Forest, and even Security and Gulf, is not relevant to the issue at hand. Forest confuses the issue by implying that the lower courts allowed the P&I coverage issue to support maritime jurisdiction. There is no indication the lower courts did so.

Security was made a third party defendant by Forest's pleading dated December 9, 1997.[8] This was about six months after the dismissal of Gulf. Security's position is that allegations of improper routing of a vessel in the context of how a grocery box was loaded, as opposed to allegations of negligence in actually directing the movement of a vessel in navigation, have never imposed liability on a time charterer and are not related to the vessel in a way to give rise to any potential vessel-related negligence (or coverage under the vessel's P&I coverage). The Trial Court's memorandum ruling of July 21, 2000 included the following comments:

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[7] R. Vol. 11, p. 1864 (p. 8), l. 7-11, p. 1865 (p. 10), l. 6-11.

[8] Vol. 4, p. 584.

> In an exhaustive review of all Fifth Circuit cases defining when a time charterer has liability, the Fifth Circuit pronounced that the traditional spheres of liability for a time charterer are choosing the vessel's cargo, route, general mission, as well as the 'specific time in which the vessel will perform its assignment.' *See Hodgen vs. Forest Oil Corporation*, 87 F.3d 1512 (1996). Although these spheres may be amended or limited by contract, there is no evidence presented to this court that any such contractual provisions exist. Furthermore, this Court notes that almost every case dealt with safety of the *timing of the unloading* due to dangerously rough seas. (emphasis in original)[9]

Forest simply wanted its goods delivered offshore and exercised no directive to the vessel on how to accomplish the mission. Furthermore, the actual theory of fault against Forest was a failure to *coordinate* the *information* regarding the vessel's route and the loading scheme in the grocery box. Gulf submit this did not fall within Forest's role as time charterer. This activity is more associated with Forest's role as platform owner/operator. Forest has no basis to argue coverage under the vessel's P&I policy for its actions as platform owner/operator.

As noted above, an issue exists as to whether Forest remained the time charterer at the time of Dahlen's injury. The evidence at trial showed the parties had evolved into a situation where Island was coordinating the information

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[9] Vol. 10, p. 1669, 1672.

regarding the use of the M/V BILLY JAY between Forest and Sante Fe Minerals. At the time, Gulf viewed Island as the chartering party.[10] The Fifth Circuit never reached this issue, but Security submits that Forest lacks coverage under the P&I policy because it was not the time charterer of the vessel at the time of the incident.

## CONCLUSION

The Fifth Circuit opinion interpreted an exclusion in a vessel P&I policy based on the plaintiff's status as an employee bringing a claim against his employer. The LHWCA protects an employee's right to bring such a claim against his employer who has a dual capacity as time charterer. Petitioner has selected one word from a sentence in the Fifth Circuit opinion to characterize the opinion as one setting forth a new direction by the Fifth Circuit on the issue of §905(b) claims. The opinion does not do so. It merely interprets a P&I policy.

The ruling finding no coverage under this policy is correct because the injury was not caused by vessel-related fault and because Forest was no longer the time charterer of the vessel at the time of the incident. As such, the vessel's P&I policy does not apply and should not provide indemnity for Forest's defense costs in this case.

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[10] R. Vol. 14, p. 42, l. 6 - p. 43, l. 7.

Respectfully submitted,

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